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PROMISSORY AND NON-PROMISSORY CONDITIONS

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1. Definitions and Classifications

Internal conditions, or those which are terms of contracts, may be classified in three different ways: (1) express, inferred, and constructive; (2) precedent, concurrent, and subsequent; and (3) promissory and non-promissory (casual).

A non-promissory condition is a fact (act or event) other than a promise which either suspends a duty of immediate performance or another condition until it happens, or extinguishes such duty or other condition upon its happening. A promissory condition is a promise whose performance either suspends a duty of immediate performance until it occurs or gives rise to such duty upon its occurrence. A non-promissory condition creates a privilege in the case of a condition precedent and a power in the case of a condition subsequent. A promissory condition creates both such a privilege (or power) and also a right.

A representation differs from a condition in that it is not a term in the contract but a fact which induces the making of a contract, and when it has operative effect it does not relate to the order of performances of the parties but

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to the question of avoidance of the contract. The term warranty is used in different senses. In insurance policies the term warranty means that a representation is warranted material, and thereby made a term in the contract and made a non-promissory condition. In charter parties the warranty is a promissory condition. In the law of sales at common law a warranty was an independent collateral promise, but under the Uniform Sales Act it is a promissory condition. In conveyancing, a warranty is still treated as an independent collateral promise rather than as a condition.

The three ways of classifying conditions are all important, but the classification of conditions as promissory and non-promissory is, on the whole perhaps, the most important and fundamental classification, a fact which the writer has proven by his classroom experience. Yet in spite of this fact, textbooks on contracts and other publications treating of the law of contracts have almost without exception ignored this classification,[1] and the writer is, so far as he knows, the only teacher of contracts who teaches the law of conditions from this standpoint.

The American Law Institute's Restatement of the law of contracts not only omits any discussion of this classification except as it is incidentally found, as for example in section 257, but has other sections which define "condition" and "promise" so as to make them mutually exclusive. Thus, in section 260 it is said that if in an agreement an act to be performed purports to be the words of the person to do the act, the words are interpreted as a promise unless a contrary intention is manifested, but if the words are those of a party who is not to do the act, the performance of the act is a condition unless a contrary intention appears; and in section 261 it is said, "Where it is doubtful whether words create a promise or an express condition they are interpreted as creating a promise." Yet in spite of these sections, there are other sections of the Restatement which recognize the distinction between non-promissory and promissory conditions and show that it is necessary to have such a classification

[1] Among the exceptions may be named the Louisiana Code, which uses the terms "casual" and "potestative," Rev. Civil Code La., §§2023-2024, New Orleans v. Texas & Pac. R. Co., 171 U. S. 312, 332 (1897), and certain writers on Sales, CHALMERS SALE OF GOODS ACT (2d) 165; BURDICK ON SALES, 84-87.

in order properly to rationalize the law of conditions.[2] The chief criticism of the quoted sections of the Restatement is that by excluding promises from conditions they ignore all the law of constructive conditions created by Lord Mansfield and this is the greater part of the law of conditions. Lord Mansfield made one of the greatest contributions to the law of contracts by his creation of the law of constructive conditions, but all of his constructive conditions were promises and therefore promissory conditions. The Restatement's attempt to distinguish between promises and conditions both ignores the work of Lord Mansfield and introduces confusion into the law of conditions.

The essential nature of promissory and non-promissory conditions and their relation to other conditions, as well as their relative importance, can be best set forth in table form. Just below, this is done. It should be noted that in this classification of conditions non-promissory and promissory conditions are made the most fundamental and the other conditions are made subsidiary. It should be noted also that there are no concurrent non-promissory conditions, but that there are precedent, concurrent and subsequent, as well as express and constructive promissory conditions.

A. Non-promissory
    1. Precedent
        a. Express
        b. Inferred
    2. Subsequent
        a. Express
        b. Constructive

B. Promissory
    1. Precedent
        a. Express
        b. Constructive
    2. Concurrent
        a. Express
        b. Constructive
    3. Subsequent
        a. Express
        b. Constructive

[2] RESTATEMENT, CONTRACTS, §§88, 250, 257, 260, 266, 293, 294 comment b, 306, and 357.

2. Illustrations

The existence, importance and relation to other conditions of promissory and non-promissory conditions can further be set forth by some illustrations. An illustration of an express precedent non-promissory condition is found where there is a promise of a buyer to pay a certain sum of money for a suit of clothes, provided he is personally satisfied with the suit after it has been made for him, in consideration for a tailor's promise to make such a suit.[3] If the tailor should promise to make the suit to the personal satisfaction of the buyer in consideration for the buyer's promise to pay a certain sum for it, the personal satisfaction of the buyer would be a constructive precedent promissory condition.[4] If the tailor should promise to make the suit to the personal satisfaction of the buyer and that he need not pay for it unless he is satisfied and the buyer should promise to pay a certain sum for it provided he is personally satisfied, the personal satisfaction of the buyer would be an express precedent promissory condition.

Another illustration of an express precedent non-promissory condition would be a promise of an owner to pay, upon the production of an architect's certificate,[5] a certain sum to a builder who has promised to build a certain building for him. Where a promisor promises to pay money on "demand" but his duty of performance is otherwise unconditional, and no other words or usage require a different result, the right of the promisee to performance is not conditional on a "demand" by him. That is, demand is not an express non-promissory precedent condition although it seems to be so made. Usage in the case of bank deposits prescribes a different result.[6]

An illustration of an inferred precedent non-promissory condition is found in the case where a person engaged in a particular trade or business promises to teach an apprentice such a trade or business in consideration for some promise of the apprentice or his father. In such case continuing in the trade or business is an inferred precedent non-promissory

[3] Brown v. Foster, 113 Mass. 136 (1873).
[4] Kendall v. West, 196 Ill. 221, 63 N. E. 683 (1902).
[5] Martinsburg etc. Co. v. March, 114 U. S. 549 (1885).
[6] RESTATEMENT, CONTRACTS, §264.

condition, so that if the employer goes out of his trade or business the apprentice is excused from his duty to work for the other party.[7] Another illustration of this kind of condition would be found where a landlord promises to make necessary repairs on the inside of a building in consideration for a promise of a tenant to pay rent. In such case, giving notice to the landlord of the need of repairs is an inferred precedent non-promissory condition.[8]

An illustration of an express subsequent non-promissory condition is found where there is a sale of a chattel to a buyer on what is called "a sale or return." In such case, the title to the chattel passes to the buyer and his duty to pay therefor arises, but if he decides he wants to return it, he may do so and this operates as an express subsequent non-promissory condition to discharge him from his liabilities.[9] A sale of this sort differs from a sale "on trial" in that in the latter case the approval of the buyer is an express precedent non-promissory condition to his duty.[10] Another illustration of an express subsequent non-promissory condition occurs when there is a provision in an insurance policy, excusing an insurance company from a liability which might have accrued under the policy unless the insured brings suit within one year from the time of the accruing of the liability.[11]

An illustration of a constructive subsequent non-promissory condition is found in case of the destruction of a building in which a promisor has promised to make repairs in consideration for the other party's promise to pay him therefor.[12] So in general, where, because of mutual assumption so-called impossibility operates to discharge a duty of a promisor, it is on the theory of a constructive subsequent non-promissory condition.[13] But perhaps the neatest illustration of a constructive subsequent non-promissory condition is found in a semi-installment contract for the payment of a sum of money in various installments, where if a party does not collect the first insallments as they become due and sues

[7] Ellen v. Topp, 6 Exch. 424 (1851).
[8] Makin v. Watkinson, L. R. 6 Exch. 25 (1870).
[9] Ray v. Thompson, 12 Cush. (Mass.) 281 (1853).
[10] Hunt v. Wyman, 100 Mass. 198 (1868).
[11] Semmes v. Hartford Ins. Co., 13 Wall. 158 (U. S. 1871).
[12] Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667 (1891).
[13] Howell v. Coupland, L. R. 1 Q.B.D. 258 (1876).

on the last installment without joining the earlier, the recovery on the last installment will operate as a constructive subsequent non-promissory condition to discharge the debtor's liability on the earlier installments.[14]

An illustration of an express precedent promissory condition is found in a case where there is a promise by a seller to manufacture a certain article for a buyer in consideration for a promise by the buyer to pay a certain sum therefor provided the article is manufactured first.[15] In such case, if the article is not manufactured by the seller, the buyer is both excused from his own duty and given a right to damages for breach of promise by the other party.

An illustration of a constructive precedent promissory condition would be found in the above illustration if the maker should promise to manufacture the article for the buyer in consideration for the buyer's promise to pay a certain sum therefor. The making of the above article is made by law a constructive precedent promissory condition because it takes time while the payment of the money does not take time, and under such circumstances fairness requires performance first of that promise which takes time.[16] If performance of one promise is fixed before the time fixed for the performance of another, there is another illustration of a constructive precedent promissory condition in the performance which is fixed to occur first.[17]

An illustration of an express concurrent promissory condition is found in a promise by a seller of land to deed the land to a buyer provided the buyer pays the sum agreed upon for the land at the time of the delivery of the deed. If in the above case nothing is said by the parties as to when delivery of deed and payment of money are to occur, delivery and payment would be a constructive concurrent promissory condition.[18]

An illustration of an express subsequent promissory condition is found where there is a promise on the part of an

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[14] Lorillard v. Clyde, 122 N.Y. 41, 25 N. E. 292 (1890).

[15] Brocas Case, 3 Leon 219 (1588); Noyes v. Brown, 142 Minn. 211, 171 N. W. 803 (1919).

[16] Kingston v. Preston, 2 Douglas 689 (1773); Clark v. Gulesian, 197 Mass. 492, 84 N. E. 94 (1908).

[17] Graves v. Legg, 9 Exch. 709 (1854).

[18] Goodisson v. Nunn, 4 T.R. 761 (1792); Morton v. Lamb, 7 T. R. 125 (1797).

automobile dealer to pay a certain sum of money for a used car of a prospective buyer upon condition that his promise shall become void upon his delivery of another new automobile which he has promised to sell to the prospective buyer.[19]

An illustration of a constructive subsequent promissory condition is found in a case where the owner of land and timber promises to convey the same to a prospective buyer at some time in the future in consideration for the buyer's promise to pay a certain sum of money therefor. In such case, there is a constructive subsequent promissory condition that the owner of the land and timber will not meanwhile cut any of the timber.[20]

3. Operation and Significance

The essential nature, characteristics and importance of promissory and non-promissory conditions will now be investigated by studying their operation. Probably the best way to determine whether or not promissory and non-promissory (or casual) conditions have special significance is to study those branches of the law of contracts where conditions are involved, for the purpose of noticing the operation of promissory and non-promissory conditions and of comparing them both with precedent, concurrent, and subsequent conditions and with express and constructive conditions. This we shall now proceed to do. The fields of contract law which we shall choose will be performance, assignment, pleading, waiver, discharge, and breach. A study of conditions in these branches of the law ought to be enough to make it possible to decide of how much vital significance promissory and non-promissory conditions are. Do promissory and non-promissory conditions create different and more difficult problems than do other kinds of conditions? Do promissory and non-promissory conditions help more than other kinds of conditions to an intelligent solution of contract problems in these fields? Is it necessary to understand these conditions in order to understand other conditions where they occur together? Is a knowledge of such conditions necessary to an understanding of the law of performance, assignment, pleading, waiver, discharge, and breach? These

[19] Torkomian v. Russell, 90 Conn. 481, 97 Atl. 760 (1916).
[20] The Duke of St. Albans v. Shore, 1 H. Black. 270 (1789).

are some of the problems which will confront us and which we shall have to answer.

A. Performance

(1) Part and Substantial Performance

Substantial performance is something less than full, strict performance but it is a performance which lacks full, strict performance only in some non-essential points, is practically as good as strict performance, and good enough for both promisor and promisee; but such performance must be a good faith attempt to fully perform a contract.[21]

No single definition of part performance can be given. Part performance may consist of any performance from a mere trifle to substantial performance. There are four species of part performance generally recognized in the law as sufficient to produce legal consequences. One is that kind of part performance above referred to which is called substantial performance.[22] Another is the part performance necessary to take outside the statute of frauds a promise to convey land.[23] A third kind is that which is enough to give a right to a quasi-contract.[24] And a fourth, that which under the doctrine of the case of *Boone v. Eyre*[25] has to be enough so that it prevents any breach going to the root of the contract.[26] This latter kind of part performance differs considerably from substantial performance and will have to be considered along with substantial performance in determining the law of conditions.

In the case of express non-promissory conditions precedent, and it should be noted there are no constructive non-promissory conditions precedent, the majority viewpoint is that neither part performance nor substantial performance has any operative effect. The whole condition must happen

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[21] Kauffman v. Raeder, 108 F. 171 (C. C. A. 8th, 1901); Dorrance et al v. Barber & Co., 262 F. 489 (C. C. A. 2d, 1919); Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (1915); Morris v. Hokosona, 26 Cal. App. 251, 143 Pac. 826 (1914); Cramer v. Esswein, 220 App. Div. 10, 220 N. Y. S. 634 (1927).

[22] Kauffman v. Raeder, 108 F. 171 (C. C. A. 8th, 1901).

[23] Overland et al v. Ware et al, 102 Neb. 216, 166 N. W. 611 (1918); Bowker v. Linton et al, 69 Okla. 280, 172 Pac. 442 (1918); Osborne v. Osborne, 24 N. M. 96, 172 Pac. 1039 (1918).

[24] RESTATEMENT, CONTRACTS, §357.

[25] 1 H. Black. 273n (1777).

[26] Tichnor Bros. v. Evans, 92 Vt. 278, 102 Atl. 1031 (1918).

before there is any resulting duty of performance,[27] unless the condition is dispensed with by a constructive non-promissory condition subsequent, which will be discussed later under the heading of "Impossibility." Yet there is a minority contra viewpoint followed by New York and a few other states that even a non-promissory express condition precedent will be dispensed with by substantial performance.[28]

Where constructive promissory conditions precedent are found, either part performance enough for the doctrine of *Boone v. Eyre*[29] or substantial performance will be enough to dispense with the condition precedent. In such a case as this, substantial performance is not required, so that here, so far as the results are concerned, it makes no difference whether there is a substantial performance or part performance somewhat less than substantial performance.[30] The original explanation for this result was that promises which were in the first place dependent promissory conditions precedent would after sufficient part performance become independent promises. Perhaps a better explanation is that the condition precedent is by a process of interpretation made to mean only this amount of part performance while the duty of the promisor is a duty to give full performance. On this explanation the promisor is only bound as a condition precedent to render this amount of part performance, but as a duty he is bound to render full performance; hence, after his part performance, the defendant's duty arises, but if the plaintiff does not perform his whole duty, the defendant also has a cause of action. The reason for this position of the courts is that in case of constructive conditions the conditions are creatures of the law and under those circumstances where justice requires it, the law can mold the conditions so as to accomplish the goal of justice. For the same reason substantial performance by the defendant will have no effect in discharging him from his duty.

It should also be noted that another way whereby this

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[27] Second Nat. Bank v. Pan-American Bridge Co., 183 F. 391 (C. C. A. 6th, 1910); Martinsburg v. March, 114 U. S. 549 (1885); Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822 (1906).

[28] Nolan et al v. Whitney, 88 N. Y. 648 (1882); Coplew v. Durand, 153 Cal. 278, 95 Pac. 38 (1908); RESTATEMENT, CONTRACTS, §303.

[29] 1 H. Black. 273n (1777).

[30] Pickens v. Bozell, 11 Ind. 275 (1858); Tichnor Bros. v. Evans, 92 Vt. 278, 102 Atl. 1031 (1918); RESTATEMENT, CONTRACTS, §275.

problem of contract law may be solved is by the law of quasi-contracts; and many cases, after part performance by a plaintiff guilty of breach either of a service contract or a building contract or a contract for the sale of goods, will permit him to recover for the benefits which he has meanwhile conferred on the other party. But in such a case, the measure of damages should not be the contract price less the counter-claim of the defendant for the plaintiff's breach, but the reasonable value of benefits which the plaintiff has conferred upon the defendant.[31]

The law as to part or substantial performance of constructive promissory conditions precedent ordinarily has no application to installment contracts because the part performance or substantial performance of one installment is not enough for the entire contract, but where the installments vary in size enough so that a part performance or substantial performance of a prior installment is a substantial performance or more than half a performance of the entire contract, there is no reason why the usual rule should not apply and there seems to be some authority for this position.[32]

Where the promissory conditions precedent are express, the usual rule is that neither substantial performance nor the *Boone v. Eyre* kind of part performance is enough, but that full, strict performance is a condition precedent.[33] The reason for this is that the parties have made the full performance a condition precedent and under these circumstances the courts do not feel free to mold the condition to accomplish justice as they do in the case of constructive promissory conditions. This is the rule in the case of non-promissory conditions and there is no reason for distinguishing between promissory and non-promissory conditions where they are express. However, New York and many other cases treat express promissory conditions like constructive promissory conditions and permit recovery after substantial performance.[34] It is not clear whether or not these cases would give

[31] WOODWARD, THE LAW OF QUASI-CONTRACTS, §§174-178. In some jurisdictions following the case of Britton v. Turner, 6 N. H. 481 (1834), recovery is allowed in quasi-contracts though the plaintiff is guilty of a wilful breach.

[32] (1924) 2 Wis. L. Rev. 363; RESTATEMENT CONTRACTS, §317; UNIFORM SALES ACT, §45; Helgar Corp. v. Warner's Features, 222 N. Y. 449, 119 N. E. 113 (1918).

[33] WILLISTON, CONTRACTS, §805.

[34] WILLISTON, CONTRACTS, §805.

the same effect to the *Boone v. Eyre* part performance, but probably they would. Otherwise the cases would draw a distinction between substantial performance and all other kinds of part performance.

Undoubtedly these minority cases are wrong and any recovery for part performance of express promissory conditions precedent should be in quasi-contract,[35] and the recovery should be the actual value of the benefits covered by part performance rather than the contract price less a counter-claim.[36] The doctrine of substantial performance, it has been said, had its origin in the equitable rule giving a decree of specific performance with compensation for breach;[37] but there is hardly justification for extending the equitable rule to an action at law so as to allow a plaintiff to recover where he has not performed an express condition precedent. It is an unfortunate substitute for the quasi-contractual rule.

So far as the law of part and substantial performance is concerned, express and constructive conditions have an equal, or greater, importance than promissory and non-promissory conditions. Yet this study shows that even in this connection the classification of promissory and non-promissory conditions is of some importance and an understanding of this classification helps to clear up the law upon the whole subject.

(2) Performance on Time as a Duty and as a Condition

The happening of some act or event within or on a specified time may be made an express non-promissory condition precedent. In such case if the act or event does not happen within the time specified, of course no duty dependent thereon will ever arise. In the same way a promise to perform at sometime in the future or before sometime in the future makes the elapse of time between the making of the contract and such future time an inferred non-promissory condition precedent, but since this time is bound to occur, it is never spoken of nor emphasized as a condition. Where time is an express non-promissory condition, time is just as important as it is where a person has been given either a

[35] Wolff, *Substantial Performance of Contracts in New York*, (1931) 16 Corn. L. Q. 180; Henry v. Jons et al, 164 Iowa 364, 145 N. W. 909 (1914); Kelly & Bragg v. Bradford, 33 Vt. 35 (1860); Blood v. Wilson, 141 Mass. 25, 6 N. E. 362 (1886).

[36] Gillis et al v. Cobe et al, 177 Mass. 584, 59 N. E. 455 (1901).

[37] HARRIMAN, CONTRACTS, §340.

mere revocable power or an irrevocable power through an option contract. Here, of course, he has a power only for the time designated and when that time has expired, his power has expired.[38]

Time raises a problem not where privileges and powers but where rights and duties are involved. That is, generally, where there are promissory conditions. Where there is a promissory condition relating to time whether time is of the essence or not has no meaning so far as the promise is concerned because a person must perform his promise according to its terms. A breach of any promise whether vital or not will give rise to a cause of action.[39] But where there is a promissory condition, the condition part of the promissory condition varies with whether or not time is of the essence of the contract. Time may be made of the essence of a contract by making a promise an express promissory condition precedent. Saying that time is the essence of the contract has the operative effect of making performance on time an express promissory condition precedent.[40] Even though the parties do not make performance on time an express promissory condition precedent either directly or by making time of the essence of the contract, time is made of the essence by construction of law even in the case of constructive promissory conditions precedent where the contract is a mercantile contract or one involving objects which fluctuate in value.[41] Where time is of the essence of the contract, one who does not perform a promissory condition precedent is not only guilty of breach of promise but his non-performance on the exact time excuses the other party from his duty to perform.[42]

In other cases, and this is especially true of contracts relating to real property, labor, and building, time is not of the essence. Here, of course, one is liable for breach of his promise, but the nature of the condition is not what it was where time is made of the essence of the contract. Where time is not of the essence of the contract, the constructive

[38] Lord Ranelagh v. Melton, 2 Drew. & S. 278 (1864); Winders v. Kenan, 161 N. C. 628, 77 S. E. 687 (1913).

[39] Freeman v. Robinson, 238 Mass. 449, 131 N. E. 75 (1921).

[40] Hoffman v. Employers' Liability Assur. Corp., 146 Ore. 66, 29 P. (2d) 557 (1934).

[41] Kentucky Distilleries etc. & Co. et al v. Warwick Co., 109 F. 280 (C. C. A. 6th, 1901); WILLISTON, CONTRACTS, §§845-855.

[42] Mazzotta v. Bornstein et al, 104 Conn. 430, 133 Atl. 677 (1926).

promissory condition precedent is by construction of law made to mean not performance on the exact time, but performance within a reasonable length of time thereafter. So that even though a promisor is guilty of delay if he tenders performance within a reasonable length of time, though he may be guilty of breach of promise, he may still hold the other party to the performance of his duty.[43]

The doctrine which we have just discussed applies to installment contracts.[44] The reasonable length of time allowed a party will also be more in the case of a breach after part performance than it will after a breach in limine.[45] Specific performance[46] will be governed by the same rules which have been given above.[47]

From this examination of the rules of law governing conditions involving time, it will be seen that whether conditions are precedent, concurrent, or subsequent is of little importance; and that whether they are express or constructive is of little more importance; but the important thing is whether or not they are promissory or non-promissory. The important thing is the distinction between the liability on the promise and the excuse of a duty because of the non-performance of a condition precedent. The law on these matters can be adequately understood only by a full understanding of the law of promissory and non-promissory conditions. The next most important problem in this connection is that of determining when time is of the essence and when it is not; but this problem is not settled by the law of express and constructive or precedent, concurrent, and subsequent any more than by the law of promissory and non-promissory conditions.

(3) Reasonable Man Standard

Where there is a condition of personal satisfaction, there arises the question of whether the person whose duty depends upon such condition is the sole judge of whether or

[43] King v. Connors, 222 Mass. 261, 110 N. E. 289 (1915).

[44] Harton v. Hildebrand et al., 230 Pa. 335, 79 Atl. 571 (1911).

[45] Beck etc. v. Colorado Milling & Elevator Co., 52 F. 700 (C. C. A. 8th, 1892); Poussard v. Spiers & Pond, 1 Q. B. D. 410 (1876); Bettini v. Gye, 1 Q. B. D. 183 (1876).

[46] St. Regis Paper Co. v. The Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701 (1906).

[47] RESTATEMENT, CONTRACTS, §276 and §313c.

not the condition has happened, or whether the happening of the condition will depend upon a reasonable man standard. The courts have sometimes made the particular individual the sole judge and sometimes the reasonable man the judge; hence the real problem is to determine when one and when the other is the judge.

Some courts have attempted to draw the line between cases (1) where fancy, taste, sensibility, or judgment is involved and (2) where only operative fitness or mechanical utility is involved; and to make the individual party the judge in the first case and the reasonable man in the second.[48] However, the cases adopting this test, or distinction, have been so confusing in drawing the line[49] that this test has become practically meaningless. A better distinction is between express conditions and constructive conditions.

Where there is an express promissory condition precedent making a party the sole judge and there is no doubt about this, the overwhelming weight of authority is that there is no recovery if the party says that he is not satisfied, whether the contract involves taste or workmanship, or a sale on trial, or a sale or return, in the absence of bad faith.[50] If there is to be any recovery under such circumstances, it must be in quasi-contract.[51] However, California,[52]

[48] Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 Pac. 428 (1919).

[49] Marcus v. Nelson, 119 N. Y. S. 1085 (1909); Brenner v. Redlick Furniture Co., 113 Cal. App. 343, 298 Pac. 62 (1931). Since 1906 twenty-one states have gone on record in favor of the rules above announced. McCartney v. Badovinac, 62 Colo. 76, 160 Pac. 190 (1916); Zaleski v. Clark, 44 Conn. 218 (1876); Hawken v. Daley et ux, 85 Conn. 16, 81 Atl. 1053 (1911); Raisler Sprinkler Co. v. Automatic Sprinkler Co. of America, 6 W. W. Harr. 57 (1934); Hay v. Hassett et al, 174 Iowa 601, 156 N. W. 734 (1916); Devoine Co., Inc. v. International Co., Inc., 151 Md. 690 (1927); Bowen v. Buckner, 183 S. W. 704 (Mo. App. 1916); Bailey v. Goldberg, 236 Mich. 29, 209 N. W. 805 (1926); Grobarchick v. Nasa Mortgage & Invest. Co., 117 N. J. L. 33, 186 Atl. 433 (1936); Lippincott et al v. Warren Apartment Co., 307 Pa. 320, 161 Atl. 330 (1932); Peck-Williamson Heat. and Vent. Co. v. McKnight & Merz, 140 Tenn. 563, 205 S. W. 419 (1918); Blue v. Hazel-Atlas Glass Co., 106 W. Va. 642, 147 S. E. 22 (1929).

[50] Gerisch v. Herold, 82 N. J. L. 605, 83 Atl. 892 (1912); Williams Mfg. Co. v. Standard Brass Co., 173 Mass. 356, 53 N. E. 862 (1899).

[51] Britton v. Turner, 6 N. H. 481 (1834); Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759 (1913).

[52] Brenner v. Redlick Furniture Co., 113 Cal. App. 343, 298 Pac. 62 (1931).

Massachusetts,[53] New York,[54] and Rhode Island[55] permit recovery in contract according to the reasonable man test in the case of workmanship and materials. The fact of substantial performance would not make any difference in the recovery because the rule as to substantial performance is like the rule just given.

Where the condition of personal satisfaction is an express non-promissory condition, the rule is the same as where the condition is a promissory condition; and in the absence of bad faith and doubt, the person whose duty depends upon such condition is the sole judge.[56]

Where personal satisfaction is a constructive promissory condition precedent (and, of course, where there is doubt as to whether a person is expressly made sole judge and where there is bad faith), the determination of the question of whether or not the condition has been performed is according to the reasonable man test.[57] The rule as to part performance might not necessarily run parallel with the rule above given because there might be recovery in case of part performance of a constructive promissory condition precedent even though a reasonable man might not be satisfied. Of course in the case of a constructive condition, good faith is required.[58] Another question which arises in

[53] MacDonald v. Kavanaugh, 259 Mass. 439, 156 N. E. 740 (1927).

[54] Caro v. Newmark et al, 197 N. Y. S. 426 (1922).

[55] Hanaford v. Stevens & Co. Inc., 39 R. I. 182, 98 Atl. 209 (1916).

[56] Gibson v. Cranage, Jr., 39 Mich. 49 (1878). Since 1906 the following cases have followed the case just cited: Jones v. Lanier, 198 Ala. 363, 73 So. 535 (1916); Goldberg v. Feldmon, 108 Md. 330, 70 Atl. 245 (1908); McCrimmon v. Murray, 43 Mont. 457, 117 Pac. 73 (1911); Williams v. Hirshorn, 91 N. J. L. 419, 103 Atl. 23 (1918); Solomon v. Ford, 108 Pa. Super. 43, 164 Atl. 92 (1933); Atlas Torpedo Co. v. United States Torpedo Co., 15 S. W. (2d) 150 (Tex. 1929).

[57] Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S. W. 750 (1911). Since 1906 the following cases have rendered decisions in accordance with the foregoing case: Hoff v. L. Gould & Co., 198 Ill. App. 499 (1916); Burns v. Reis, 196 Mo. App. 694, 191 S. W. 1096 (1917); Waite v. C. E. Shoemaker & Co., 50 Mont. 264, 146 Pac. 736 (1915); Melson v. Turner, 125 Neb. 603, 251 N. W. 172 (1933); Lumbermen's National Bank of Portland v. Minor, 65 Ore. 412, 133 Pac. 87 (1913); Morgan v. Gamble et al, 230 Pa. 165, 79 Atl. 410 (1911); Janssen v. Muller. 38 S. D. 611, 162 N. W. 393 (1917); Fessman v. Barnes, 108 S. W. 170 (Tex. 1908); Yarno v. Hedlund Box & Lumber Co., 129 Wash. 457, 225 Pac. 659 (1924); Midgley et al v. Campbell Bldg. Co., 38 Utah 293, 112 Pac. 820 (1911).

[58] WILLISTON, CONTRACTS, §675a.

the case of a constructive promissory condition is whether both the promise and the condition are governed by the reasonable man rule or only the condition. If the analogy of the condition of time were to be followed, the reasonable man standard would affect only the condition.

So far as the reasonable man standard is concerned, the most important classification of conditions is that of express and constructive.

B. Assignment

A promisee may assign any right[59] unless it varies the duty of the promisor or the assignment is forbidden by statute, public policy, or the contract;[60] but no one can assign a mere license,[61] nor a privilege or power,[62] nor a duty, though if the duty is one which can be performed through a servant or agent, one who assigns his right may delegate the performance of his duty to the assignee of the right.[63] It follows as a consequence that a mere non-promissory condition cannot be assigned and the same thing is true of the condition part of a promissory condition. This is true both because the condition creates only a privilege and because the condition is so attached to the duty that it is not allowed in any way to be separated from the duty. But a right whether created by a promissory condition precedent either express or constructive, or a right dependent upon the prior performance of either a promissory or a non-promissory condition may be assigned. However, in such case the assignee takes the right as modified either by the non-promissory or promissory condition in the same way that the assignor took the right. That is, if the duty of the other party was modified by a condition before assignment, it continues to be so modified after assignment.[64]

In the case of assignment, the only conditions which have

[59] Jemison v. Tindall, 89 N. J. L. 429, 99 Atl. 408 (1916); Wilkins v. Hardaway, 159 Ala. 565, 48 So. 678 (1909).

[60] RESTATEMENT, CONTRACTS, §151.

[61] Marston v. Carter, 12 N. H. 159 (1841).

[62] Boulton v. Jones and another, 2 H. & N. 564 (1857).

[63] Devlin v. The Mayor etc. of New York, 63 N. Y. 8 (1875); British Waggon Co. et al v. Lea & Co., 5 Q. B. D. 149 (1880); American Lithographic Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909 (1914); Eastern Advertising Co. v. McGaw, 89 Md. 72, 42 Atl. 923 (1899).

[64] Homer v. Shaw, 212 Mass. 113, 98 N. E. 697 (1912); American Bridge Co. et al v. Boston, 202 Mass, 374, 88 N. E. 1089 (1909).

any special significance are promissory and non-promissory conditions.

C. Pleading and Proof

The plaintiff has the burden of pleading and proving the performance and happening of all conditions precedent, except in case of insurance, whether they are express promissory conditions or constructive promissory conditions or express non-promissory conditions.[65] So far as pleading is concerned, the law knows no special class of constructive conditions. And the plaintiff has the burden of pleading and proving a readiness and willingness to perform a promissory concurrent condition, express or constructive.[66] The defendant has the burden of pleading and proving the performance or happening of all conditions subsequent,[67] and even, for practical reasons, the happening of conditions precedent in insurance cases.[68]

So far as pleading and proving the happening or performance of conditions, the only classification of conditions which has any special significance is that of precedent, concurrent, and subsequent.

D. Discharge

(1) Waiver

A modern text writer is of the opinion that there is no such thing as waiver, and that what is often spoken of as waiver is either estoppel, or election, or discharge by some kind of contract,[69] and consequently he called his book *Waiver Distributed.*[70]

There certainly has been a lot of confusion of waiver with contract, election, and estoppel. Courts have sometimes said waiver is "in the nature of a contract."[71] Again it has been said "waiver equally with its counterpart of election per-

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[65] McGowin v. Menken, 223 N. Y. 509, 119 N. E. 877 (1918).

[66] WILLIS, *Assumpsit,* 3 STANDARD ENCY. OF PRO., 186.

[67] Northwestern National Life Ins. Co. v. Ward, 56 Okla. 188, 155 Pac. 524 (1916); The Wilmington & R. R. Co. v. Robeson, 27 N. C. 321 (1845).

[68] Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 Atl. 109 (1912).

[69] EWART, WAIVER DISTRIBUTED.

[70] Ewart, *Waiver in Insurance Law,* (1926) 35 Yale L. J. 970. See also Vance, *Waiver and Estoppel in Insurance Law,* (1925) 34 Yale L. J. 834.

[71] Kiernan v. The Dutchess County Mutual Ins. Co., 150 N. Y. 190, 44 N. E. 698 (1896).

vades nearly every department of the law."[72] Again the courts have said "the doctrine of waiver rests upon estoppel" and "the terms waiver and estoppel . . . are so nearly alike and as applied in the law of insurance so alike in the consequences which follow their successful application that they are used indiscriminately."[73] If waiver is a separate topic and method of discharge, it requires none of the essentials of a contract but a mere voluntary relinquishment of some advantage; it requires no choice between two or more alternatives but only the giving up of one freedom of action; and it requires no reliance upon a statement but a mere voluntary surrender. Hence none of the above quoted statements should be made.

Distinguishing waiver as above suggested, Mr. Ewart seems to be right so far as rights are concerned. There can be no waiver of a right. In order to relinquish a right a person must either be guilty of estoppel, election, or the making of a contract. This principle was thoroughly established by the case of *Foakes v. Beer*,[74] and this case has been followed almost everywhere in the United States.[75] In spite of this well-established rule, the courts somewhat inconsistently do permit disclaimer in the case of a contract under seal and in the case of a third party beneficiary contract.[76]

Yet though Mr. Ewart seems to have made his case so far as concerns rights, he seems to be entirely wrong so far as concerns privileges, powers, and immunities. So far as all of these matters are concerned, there is an abundance of authority for the proposition that waiver in its narrower sense is a method of discharge. Thus there may be waived the privilege of jury trial,[77] as well as any of the

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[72] BISHOP, CONTRACTS (2d), p. 329.

[73] Ervay v. Fire Ass'n. of Phialdelphia, 119 Iowa 304, 93 N. W. 290 (1903); MAY, INSURANCE, Vol. 2, p. 1203.

[74] L. R. 9 App. Cas. 605 (1884).

[75] Warren v. Skinner, 20 Conn. 559 (1850); Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 N. E. 198 (1908); Bender v. Been, 78 Iowa 283, 43 N. W. 216 (1889); Call et al v. Pinson et al, 180 Ky. 367, 202 S. W. 883 (1918); Zinke v. Knights of the Maccabees of the World, 275 Mo. 660, 205 S. W. 1 (1918); Decker v. George W. Smith & Co., 88 N. J. L. 630, 96 Atl. 915 (1916); Sherman v. Pacific Coast Pipe Co., 60 Okl. 103, 159 Pac. 333 (1916); Clark v. Summerfield Co., 40 R. I. 254, 100 Atl. 499 (1917); Wheeler v. Wheeler, 11 Vt. 60 (1839).

[76] RESTATEMENT, CONTRACTS, §104 and §137.

[77] Patton v. United States, 281 U. S. 276 (1930).

procedural privileges guaranteed by the Bill of Rights.[78] The power of acceptance of an offer may be waived either by a counter offer or by a rejection, and so may the power of avoidance of a contract by a ratification.[79] In the same way an immunity, like an immunity from taxation or garnishment, may be waived by a mere statement or conduct from which such intention may be inferred.[80] Consequently, waiver should be defined as a voluntary relinquishment of a privilege, power, or immunity. Defined in this sense, it is very clear that here is some waiver which Mr. Ewart did not distribute. And we shall use waiver in this sense in our investigation of waiver in its relation to promissory and non-promissory conditions.

In the case of promissory conditions the promise part of the promissory condition creates a right and in accordance with the law we have already set forth, this right cannot be waived;[81] in order to terminate such a right there must be estoppel,[82] or election,[83] or a new contract;[84] but the condition part of the promissory condition may be waived because it creates only a privilege.[85] It makes no difference whether the promissory condition is an express condition or a constructive condition because there is a promise in one case as much as the other.

Non-promissory conditions, which must be express if precedent but may be either express or constructive if subsequent, create only privileges and like other privileges they are subject to waiver. A great many conditions of this sort occur in insurance contracts. In such cases the courts hold that waiver alone without estoppel is enough to wipe out a condition.[86] Conditions of this sort in bills and notes may be

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[78] WILLIS, CONSTITUTIONAL LAW, 524, 527, 531, 542, and 558.

[79] Wittwer v. Hurwitz et al, 216 N. Y. 259, 110 N. E. 433 (1915); Minneapolis Etc. R. Co. v. Columbus Rolling Mill Co., 119 U. S. 149 (1886).

[80] Sturges v. Jackson, 88 Miss. 508, 40 So. 547 (1906).

[81] Jobst v. Hayden Bros., 84 Neb. 735, 121 N. W. 957 (1909).

[82] Jobst v. Hayden Bros., 84 Neb. 735, 121 N. W. 957 (1909).

[83] Catholic Foreign Missionary Soc. of America v. Oussani, 215 N. Y. 1, 109 N. E. 80 (1915).

[84] Shallenberger v. Standard Sanitary Mfg. Co., 223 Pa. 220, 72 Atl. 500 (1909).

[85] Craig v. Lane, 212 Mass. 195, 98 N. E. 685 (1912).

[86] Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921 (1902).

waived.[87] In the interesting case of *Clark v. West*[88] the court held that the condition of keeping sober was a non-promissory condition and that it therefore could be waived. However, the courts hold that to give one a right to sue another party when there is a condition precedent to the defendant's duty, any waiver to give the plaintiff a cause of action must occur before the institution of the suit.[89]

Prevention, though it is a form of breach, may also operate as a form of waiver where there is a non-promissory condition precedent. Prevention by the promisor will amount to a waiver of the condition.[90] Prevention by the promisee of the happening of such a condition will have no operative effect because he will be estopped to say that the condition has happened. Prevention by the promisee of the promisor's performance of his promissory condition precedent will amount both to a waiver of the promissory condition and a breach on the part of the promisee.[91] A prevention by the promisor of himself to perform a promissory condition precedent will amount to a breach,[92] and it will excuse a concurrent condition to be performed by the other party.[93] But in the case of promissory conditions the fact that the defendant may make himself guilty of breach and may excuse a condition of the plaintiff does not also excuse any duty which the plaintiff has to perform or the duty part of a promissory condition.[94]

This study of the topic of waiver shows conclusively that so far as this topic is concerned, the conditions which have the most significance are promissory and non-promissory conditions. It makes no difference whether the conditions are express or implied, precedent, concurrent or subsequent, but it does make all the difference in the world as to whether they are promissory or non-promissory.

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[87] Stanley et al v. McElrath, 86 Cal. 449, 26 Pac. 800 (1890); McKenna v. Vernon, 258 Pa. 18, 101 Atl. 919 (1917).

[88] 193 N. Y. 349, 86 N. E. 1 (1908).

[89] A. D. Granger Co. v. Brown-Ketcham Iron Works, 204 N. Y. 218, 97 N. E. 523 (1912).

[90] E. I. DuPont deNemours Powder Co. v. Schlottman, 218 F. 353 (C. C. A. 2d, 1914).

[91] Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472 (1912).

[92] Clark v. Gulesian, 197 Mass. 492, 84 N. E. 94 (1908).

[93] Mary Short v. Stone, 8 Q. B. 358 (1846).

[94] Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759 (1913).

(2) Impossibility

Anglo-American courts have not made impossibility as such a defense as they might have done,[95] or as they might have made impossibility created by law a defense of illegality. They also have not made any defense allowed a matter of the intention of the parties although they might have done this.[96] They have preferred to make impossibility as such have no operative effect either to prevent the making of a contract or to discharge a contract.[97] However, where the parties have made a mutual assumption as to some matter of law, or of fact, as the basis for their performance, the courts, where this is done, will make impossibility, or impracticibility, or almost anything else, a non-promissory constructve condition subsequent (or sometimes precedent), and this condition will operate to discharge either a non-promissory condition precedent or any promissory condition express or constructive in a contract.[98]

The non-promissory conditions which are likely to be discharged by this kind of a constructive non-promissory condition subsequent are those found in insurance policies and in architect certificates. Thus where a policy of insurance provides for forfeiture for non-payment of premiums on time, this express non-promissory condition in the policy will be discharged (or suspended) by a constructive non-promissory condition subsequent of war where the parties deal on the mutual assumption of peace.[99] An express non-promissory condition precedent of the production of an architect's certificate will be discharged by a constructive non-promissory condition subsequent of death, or collusion, or spite, because parties are assumed to deal on a mutual assumption that the architect is going to continue to live, or will not be guilty of collusion, or spite.[100]

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[95] GOTTSCHALK, IMPOSSIBILITY OF PERFORMANCE IN CONTRACTS 48, 95.

[96] Page, *The Development of the Doctrine of Impossibility of Performance*, (1920) 18 Mich. L. Rev. 589.

[97] King v. Braine, Owen 60 (1579); Fargo et al v. Wade, 72 Ore. 477, 142 Pac. 830 (1914); Superintendent etc. of Trenton v. Bennett et al, 27 N. J. L. 513 (1859); Whitman v. Anglum, 92 Conn. 392, 103 Atl. 114 (1918).

[98] Taylor v. Caldwell, 3 Best. & S. 826 (1863); Hawkes v. Kehoe et al, 193 Mass. 419, 79 N. E. 766 (1907).

[99] VANCE, INSURANCE, 219; RESTATEMENT, CONTRACTS, §307.

[100] Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822 (1906); Martinsburg v. March, 114 U. S. 549 (1885).

The best illustrations of the discharge of promissory conditions both as promises and as conditions by a constructive non-promissory condition subsequent are found in cases of prospective disablement, insolvency, destruction of the object to which a contract relates, death, failure of a contemplated means of performance, failure of a necessary means of performance, war, and frustration of the purpose of a contract. A constructive promissory condition precedent to deliver ties along side for cash is excused by a constructive non-promissory condition subsequent of failure to make preparation to pay cash, on the theory that the parties dealt on this mutual assumption.[101] A constructive promissory condition concurrent to convey land in exchange for other land is excused by a constructive non-promissory condition subsequent of failure of title where the parties have dealt on this mutual assumption.[102] A constructive promissory condition precedent to deliver merchandise for a promise to pay therefor on future credit is discharged so far as the credit is concerned by a constructive non-promissory condition subsequent of insolvency.[103] A constructive promissory condition precedent of the lease of a music hall is discharged by a constructive non-promissory condition subsequent of the continued existence of the music hall.[104] A constructive promissory condition concurrent of the conveyance of land is excused by a constructive non-promissory condition subsequent of the destruction of a building.[105] A constructive promissory condition precedent to work is discharged by a constructive non-promissory condition subsequent of death.[106] A constructive promissory condition precedent to raise cotton is discharged by a constructive non-promissory condition subsequent of failure of crop when the parties expected the cotton to be raised on particular land.[107] A duty to give an annual

[101] McCormick et al v. Tappendorf et al, 51 Wash. 312, 99 Pac. 2, (1909).

[102] Caporale v. Rubine, 92 N. J. L. 463, 105 Atl. 226 (1918).

[103] Pardee v. Kanady et al, 100 N. Y. 121, 2 N. E. 885 (1885).

[104] Taylor v. Caldwell, 3 Best. & S. 826 (1863).

[105] Hawkes v. Kehoe et al, 193 Mass. 419, 79 N. E. 766 (1907).

[106] Yerrington v. Greene et al, 7 R. I. 589 (1863). This case held that there was a constructive non-promissory condition subsequent of death by either party. There is no logical necessity for this. The mutual assumption might very well relate to the continued life of only one party. Phillips v. Alhambra Palace Co. 1901, 1 K. B. D. 59; Toland Admr. v. Stevenson, 59 Ind. 485 (1877).

[107] C. G. Davis & Co. v. Bishop, 139 Ark. 273, 213 S. W. 744 (1919).

pass is discharged by a constructive non-promissory condition subsequent of a law prohibiting the issuance of passes.[108] A duty to pay a royalty for iron is discharged by a constructive non-promissory condition subsequent of a failure of iron to mine.[109] A duty to pay for gravel for a bridge is discharged by a constructive non-promissory condition subsequent of impossibility to get the gravel above the water level.[110] A constructive promissory condition precedent to transport gold is discharged by a constructive non-promissory condition subsequent of war.[111] A constructive promissory condition precedent to build a floor in a building is discharged by a constructive non-promissory condition of the continued existence of the building as a necessary means of performance.[112] A duty to pay for rooms hired to view a coronation parade is discharged by a constructive non-promissory condition subsequent of frustration of the object, where the king's illness postponed the pageant. The reason for all these non-promissory conditions subsequent is the mutual assumption as to some matter on the basis of which the parties are held to have dealt.[113]

It should be noted that the courts are beginning to create contract duties as well as quasi-contract, public utility, and trust duties by construction of law.[114] Where the courts create a contract duty in this way without a promise, it should be excused by a subsequently occuring accident even though there is no mutual assumption. Thus a constructive duty to exercise diligence should be excused by a strike.[115]

The question of when there is a mutual assumption is

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[108] Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759 (1913). Note that in this case a duty rather than a promissory condition was discharged. A promissory condition precedent had already been performed. For this reason after the discharge of the contract duty the court created a quasi-contract for the party who had already performed.

[109] Virginia Iron, Coal & Coke Co. v. Graham et al, 124 Va. 692, 98 S. E. 659 (1919).

[110] Mineral Park Land Co. v. Howard et al, 172 Cal. 289, 156 Pac. 458 (1916).

[111] North German Lloyd v. Guaranty Trust Co., 244 U. S. 12 (1917).

[112] Carroll v. Bowersock, 100 Kan. 270, 164 Pac. 143 (1917).

[113] Chandler v. Webster, 1 K. B. 493 (1904).

[114] Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214 (1917); (1940) 40 Col. L. Rev. 141.

[115] Richland S. S. Co. v. Buffalo Dry Dock Co., 254 F. 668 (C. C. A. 2d, 1918).

a question of law and not of fact.[116] But there is no test nor formula for determining the action of the court other than the reasonable man test. Apparently the court puts itself in the place of a reasonable man and determines whether or not the parties if they had thought about the matter would have contemplated some matter as the basis for their performance of their duties.[117]

So far as the topic of impossibility is concerned, non-promissory conditions are more important than any other kinds of conditions, because they operate to discharge but there can be no breach of them. The constructive condition read into the contract in all of the cases is a non-promissory condition. It is also a condition subsequent, but the fact that it is non-promissory is fully as important as that it is subsequent. Of course it is also constructive and this is a matter of considerable importance, but not so important as that it is non-promissory. It is also important to know that this condition may operate upon both non-promissory and promissory conditions precedent.

Of course prevention is another kind of impossibility, but with the topic of impossibility rationalized as it has to be under Anglo-American law, it has seemed better to treat prevention under the topic of waiver.

(3) Miscellaneous

So far as other methods of discharge are concerned (except breach), it makes no difference whether the conditions are promissory or non-promissory, express or constructive, precedent, concurrent, or subsequent. Any and all of them, for example, can be discharged by estoppel, or by a consensual substituted contract, or an accord, or a contract of rescission, or a contract of novation, or a contract of arbitration. In the case of a breach of a promissory condition precedent, if the other elects to treat it as a discharge and if, in the case of failure of performance, it goes to the essense of the contract, the breach will have the operative effect of discharge.

E. Breach

A breach of contract is a legal wrong, and there is a

[116] Kinzer Construction Co. v. State of New York, 125 N. Y. S. 46 (1910).

[117] Dahl v. Nelson, Donkin & Co., 6 App. Cas. 38 (1881); Buffalo and Lancaster v. Bellevue, 165 N. Y. 247, 59 N. E. 5 (1901); Sturge, *The Doctrine of Implied Conditions,* (1925) 41 L. Q. Rev. 170-1.

breach of contract whether or not it goes to the essence of the contract or whether or not the other party elects to treat it as a breach except in the case of anticipatory breach. But there can be no legal wrong except where a person fails to discharge his duty. For this reason, of course, there can be no breach of a non-promissory condition or the non-promissory phase of a promissory condition; and it makes no difference whether the non-promissory condition is express or constructive, or precedent, concurrent, or subsequent. However, as already above shown, the prevention of a non-promissory condition precedent by one who is under duty operates as a waiver of such condition.

Breach of contract may occur not only in the case of a duty created by an independent promise but also in case of a duty created by a promissory condition whether express or constructive, whether precedent, concurrent, or subsequent, and this breach may arise either by failure of performance,[118] or by prevention,[119] or by repudiation.[120] According to the weight of Anglo-American authority, a breach may be an anticipatory breach before the time for performance, as well as an actual breach at the time of performance, except in the case of independent promises and a promise in a unilateral contract, at least after the other party before a retraction elects to treat the breach as a breach.[121] The anticipatory breach doctrine affects the law of conditions the same as an actual breach. Ordinarily where there is an installment contract, a breach of a first installment will not amount to a total breach of the entire contract; but if the breach of a prior installment is enough to go to the root of the entire contract, it will amount to a total breach.[122]

So far as breach is concerned, it is apparent that the distinction between promissory and non-promissory conditions

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[118] Bettini v. Gye, 1 Q. B. D. 183 (1876).

[119] E. I. DuPont de Nemours Powder Co. v. Schlottman, 218 F. 353 (C. C. A. 2d, 1914); Canda v. Wick, 100 N. Y. 127, 2 N. E. 381 (1885).

[120] Torkomian Jr. v. Russell et al, 90 Conn. 481, 97 Atl. 760 (1916).

[121] Hochster v. De La Tour, 2 E. & B. 678 (1852); Rayburn et al v. Comstock et al, 80 Mich. 457, 45 N. W. 382 (1890); Lagerloef Trading Co. Inc. v. American Paper Products Co. of Ind., 291 F. 947 (C. C. A. 7th, 1923).

[122] United Press Ass'n. v. The National Newspaper Ass'n., 237 F. 547 (C. C. A. 8th, 1916); UNIFORM SALES ACT, §45; RESTATEMENT, CONTRACTS, §317.

is more important than that between other conditions, because there can be no breach of non-promissory conditions but there can be a breach of promissory conditions.

F. Irrevocable Powers

According to Mr. Williston and the Restatement of Contracts, an irrevocable power is a right and a contract.[123] Is this position correct? Can there be an irrevocable power which is not a right? For example, where an offeror offers a promise for an act and a part of the act has been performed, does the offeree have an irrevocable power, because after part performance he acquires an immunity against the offeror revoking his offer, or does he have a right? The Restatement says that he has a right and the offeror is bound by a contract "the duty of immediate performance of which is conditional on the full consideration being given." It must be assumed that the condition spoken of is an internal constructive non-promissory condition. If this is a correct interpretation of the factual situation, undoubtedly this condition is one which should have been discussed heretofore. But the writer of this article takes the position that in the hypothetical the offeree does not as yet have a right or a contract, and therefore there is no condition to be discussed. Yet the writer believes that the situation, since it involves the law of privileges and power, is analogous to the situations we have heretofore discussed in the case of non-promissory conditions, and that the answer to the problem thereby raised will have to be found in the law above set forth.

The courts have not agreed in their answers to the hypothetical above set forth. Some courts unjustly have said that in such case part performance by the offeree amounts to nothing, so that the offeror still has the power of revocation and the power of the offeree does not become irrevocable.[124] Other courts illogically have held that part performance makes the unilateral contract bilateral.[125] Other cases illogically have held that part performance amounts to an acceptance and creates a unilateral contract.[126] Still other cases have held that the beginning of performance destroys

[123] RESTATEMENT, CONTRACTS, §45.

[124] Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669 (1890); Petterson, Ex. v. Pattberg, 248 N. Y. 86, 161 N. E. 428 (1928).

[125] Braniff et al v. Blair et al, 101 Kan. 117, 165 Pac. 816 (1917).

[126] Brackenbury et al v. Hodgkin et al, 116 Me. 399, 102 Atl. 106 (1917).

the offeror's power of revocation and makes the offeree's power irrevocable.[127] A variant on this last position is that part performance operates as injurious reliance on the offer so as to create an option contract to keep the offer open.[128]

The writer takes the position that the correct holding is that part performance creates an irrevocable power, because the offeror has lost his power of revocation, but that there is no contract as yet, though the offeree has the power by completing the rest of the act to make a contract. Accepting this as the correct rationale, why is this irrevocable power not a right? The first argument is the argument of offer and acceptance itself. The offeror has given the offeree a power by performing a designated act to create a contract. There can be no contract until that power has been exercised. An exercise of a part of the power by doing a part of the act is not enough. The offeror would still have his power of revocation were it not for the fact that by allowing the offeree to partly perform he has allowed the offeree to acquire an immunity.

If the offeree has only a power under the law already developed, he may waive it; but if he has a right, he has something which he cannot waive. It is believed that the offeree may waive his power of acceptance even after his part performance. Again, if the offeree has only an irrevocable power, he has nothing which he can assign; but if he has a right, of course that can be assigned. Again, it is believed that the offeree has nothing which is capable of assignment. In the same way, if the offeree has a right and a contract, the offeror can break this contract. After the offeror has broken his contract, the law would forbid the offeree to enhance his damages,[129] and thus it would be impossible for him to perform the rest of the act which the Restatement and Mr. Williston make a condition to the liability of the breacher. Still further to show the fallacy of the Restatement's position, suppose that an offeror makes to the general public an offer of a reward of $1000 for finding and returning to him in good condition an automobile which has been stolen from him, and suppose a hundred people immediately begin to perform some

[127] Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902); Ruess v. Baron, 10 P. (2d) 518 (Cal. App. 1932); Offord v. Davies, 12 C. B. (N. S.) 748 (1862).

[128] McGovney, *Irrevocable Offers*, (1914) 27 Harv. L. Rev. 644.

[129] Lagerloef Trading Co. Inc. v. American Paper Products Co. of Ind., 291 F. 947 (C. C. A. 7th, 1923).

of the acts required for finding and returning this automobile. After part performance by all one hundred of these offerees suppose the offeror should repudiate his offer (contract). Would he be liable for breach of contract to all one hundred of these offerees? This hypothetical and these arguments ought to be enough to show that the offeree does not have a contract right but only an irrevocable power. The students referred to in another note have searched diligently for any cases on these points, but they have been unable to find any. It is too bad that the courts have not settled the question either on the basis of waiver, or assignment, or breach; but, because they have not, the only answer which can be given is an answer of logic, and it seems to the writer that the logical answer is as above given. And with that answer of course the question of waiver, assignment, and breach will have to be answered in the same way that a non-promissory condition would be answered, because only privileges, powers and immunities are concerned.

If the offeror should prevent the offeree's performance of the rest of the act called for by the offer, it might well be held that this act (which is really an external condition precedent to the formation of a unilateral contract) had been waived so that in that case the offeree would acquire a right and the offeror would be liable for breach.[130]

This study, it is believed, has been sufficient to show both the existence and the significance of promissory and non-promissory conditions in the law of contracts. As a result it is believed that it has been proved not only that they have greater operative effect than other conditions on the relations of contracting parties, but that the only rationale for the law of past and substantial performance, time of performance, the reasonable man standard in personal satisfaction cases and for waiver is the law found in constructive promissory conditions; and that more than any other conditions, promissory and non-promissory conditions tend to rationalize the law in some other difficult fields of contracts, like assignment, impossibility, and breach. For these reasons they are the most significant of all conditions, and an understanding and use of them are absolutely necessary to a complete mastery of the law of conditions and contracts.

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[130] Down v. De Groot et al, 83 Cal. App. 155, 256 Pac. 438 (1927).